

In the United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES GOODWIN POWELL, and ANNA
STRACHAN POWELL, husband and wife,
Appellants,

vs.

PETER J. WUMKES,

Appellee.

Appellants' Opening Brief

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No. 10945

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RECORD ON APPEAL

This proceeding is to review the decision of the Honorable Paul J. McCormick, Judge of the United States District Court, vacating, setting aside, and annulling the Conciliation Commissioner-Referee's Findings of Fact, the Conclusions of Law, and the Order of the Conciliation Commissioner-Referee determining value of debtors' real property, dated June 21, 1944.

The Record on Appeal contains the complete record and all of the proceedings and evidence in the above matter.

Said transcript of record is herein referred to by the letter "T" and the pages by their number.

JURISDICTION

The right of the Court to review the Orders of the Conciliation Commissioner has been repeatedly recognized. Perhaps one of the most recent cases on this point is *Rait v. Federal Land Bank of St. Paul*. (135 Fed. 2d 447).

STATEMENT OF THE CASE

Appellants, Powell and his wife, were engaged in farming operations, to-wit, growing citrus products. The property consisted of two adjoining parcels of land, one approximately 4.2 acres in size planted to citrus trees, with a house, garage, poultry house thereon, etc., being encumbered with a Trust Deed in favor of one Frank Clark, and the second parcel adjoining the Clark property consisting of approximately 5-7/8ths acres planted to citrus and encumbered by a Trust Deed in favor of Peter J. Wumkes. For purposes of clarity, reference to each grove hereafter will be by the use of descriptive words such as "Clark Grove or Wumkes Grove." For purposes of brevity, parties may be referred to hereafter by the use of the last name, such as, "Powell, Clark or Wumkes."

On the 25th day of July, 1940, Powells filed their Petition and Schedules, the debts consisting of the taxes, trust deeds on the property, and a small balance on a car, but no other debts. Thereafter the proceedings were referred to Hon. Fred Duffy, United States Conciliation Commissioner for the County of San Bernardino. Having been unable to secure acceptance or confirmation of their extension proposal, Powells then filed their amended Petition, and on October 24, 1940, they were adjudicated bankrupts under Section 75(s) of the Bankrupt Act (T-16).

Thereafter and on June 16, 1941, the Commissioner made his Order staying proceedings for three years and fixing the rental for said property.

On December 23, 1942, Powells filed a Petition requesting reappraisal or hearing to determine value of the real property, which said matter was set down for a hearing by the Commissioner and after numerous continuances made at the request of Wumkes' attorneys, was reset for March 3, 1943, and on the 9th day of April, 1943, said Commissioner entered an Order determining the value of said real property. That a Petition for review was taken therefrom to the District Court and Judge Leon R. Yankwich of the District Court reversed the Commissioner's decision and the Honorable Circuit Court of Appeals in the case of Powell vs. Wumkes, No. 10610, affirmed the decision of Judge Yankwich.

That in accordance with the Order of the Court on the 2nd day of May, 1944, a rehearing on the Petition to determine value of debtors' real property came on for hearing before the Conciliation Commissioner, and present at said hearing were the debtors, their attorney, H. R. Griffin, the Petitioning Creditor, Peter J. Wumkes, and his attorneys, Nichols-Cooper & Hickson, by Donald P. Nichols.

Oral testimony and documentary evidence being introduced, and the matter was submitted for decision, and on the 26th day of May, 1944, the Commissioner rendered his decision, (T-12), determining that the value of the property was \$5,575.00. Appellee then petitioned the District Judge for a review (T-30:1-34), and also at the time of the hearing before Judge McCormick presented certain affidavits (T-36; T-38). Objection to the omission of said affidavits was made by debtors' attorney, and on Septem-

The third witness was J. W. Mehl, who now is and since —
ber 23, 1944, the Court overruled the objection and ordered said affidavits filed and considered (T-39), and also entered an Order vacating the Commissioner-Referee's Order determining value and recommitting the matter back to the Conciliation Commissioner for a further hearing (T-40). Then, from this Order and Judgment of the Honorable McCormick, this appeal is taken.

STATEMENT OF POINTS ON APPEAL

To the Above Honorable Court:

Appellants hereby designate the following points upon which they intend to rely upon said appeal, as follows:

I.

That the Honorable District Court of the United States erred in vacating, setting aside and annulling the Order of the Conciliation Commissioner-Referee determining value of debtors' real property, dated June 21, 1944.

II.

That the decision of the District Court of the United States was contrary to the law made and propounded for such matters.

III.

That the District Court admitted and considered improper and illegal evidence in the making of said decision, and each of them, to-wit, the affidavits and offers to purchase of Donald D. Wyllie and L. A. Turner, and others.

ARGUMENT

Perhaps in approaching this matter it would be well to bring to the court's attention some of the testimony as produced at the hearing before the Conciliation Commissioner, and perhaps the language of the Conciliation Commissioner given in his decision is one of the clearest and most concise ways of presenting these facts. Therefore, we find that at the time of the hearing of the Conciliation Commissioner, Powell produced three eminently qualified appraisers, one being Charles Aubrey, engaged in appraising lands for over 25 years in different parts of the United States, including the County of Ventura, Los Angeles, Orange, Riverside, San Bernardino, and 11 other counties in the State of California, who had appraised property for the New York Life Insurance Company, on farm lands, has appraised property for the Federal Land Bank, appeared as witness on various appraisals in the Federal Court, has been supervisor of Farm Security Administration, who determined the value of Wumkes' property to be \$5,200.00. (T-12).

The second witness, W. H. Johnson, who has been in real estate and appraising business for over 20 years, was connected with the Redlands-Yucaipa Land Company, whose business was developing fruit land, subdivisions, operator of deciduous orchards for 30 years, has acted as an appraiser on several occasions in the Superior Court and in the Federal Court, who has made a thorough study of the property in question, drawing a plat showing condition of trees, photographs, etc., and fixed the market value of said property at \$5,400.00. (T-13).

1931, has been the Inheritance Tax Appraiser of the State of California, in and for the County of San Bernardino, and that he has appraised considerable citrus property and other property during said 13 years experience; that upon a consideration of all of the elements which should enter therein, he determined the value of this property to be \$5,575.00. (T-13).

As against this testimony, the Creditor, Peter J. Wumkes, produced Lyman M. King, President of the Redlands Federal Savings and Loan Association, dealing almost exclusively in houses and lots and not involving the lending of money on citrus groves, except occasionally when there might be a home thereon, who had formerly acted as State Inheritance Tax Appraiser, and who determined the value to be \$11,912.50. (T-14).

Fred Brock, a witness on behalf of the Creditor, testified that his business or occupation was orange growing and real estate and dry farming. That he had been engaged in real estate business since 1927, off and on during that time, and that he owned some property, that he fixed the value of \$12,000.00, with heating equipment, and \$11,000.00 without heating equipment. That in no place in his testimony does he show that he ever acted as an appraiser for any one and he testified that bidders in most cases today never question what the best production is but only, "Can I have the property." (T-14).

J. H. Nicholson, a witness on behalf of the debtors, testified that he was the assistant secretary of the Redlands Heights Groves, and has been since 1927; that he is familiar with the property and that the value of the property, in his opinion, was \$6,000.00. (T-14).

Ted Pratt, called on behalf of the Creditor, testified that

he worked in the field for the Orange Belt Fruit Distributors of Pomona, who are packers, shippers and growers and has worked for them for three years,, and before that was an automobile salesman; that he did not appraise property for the purpose of sale or buying, but to give his company protection in advance on various crops. That the reasonable market value, in his opinion, is \$12,000.00. (T-15-114). When asked to explain what he meant by reasonable market value, "Well, the use of the land for its most practical purpose and the value of the trees and water stock. It is not its potency, particularly, but its production. I investigated the crop record."

Peter J. Wumkes, the Creditor, testified that the property, in his opinion, was worth between \$13,000.00 and \$15,000.00. Dr. Wumkes is a retired dentist spending most of his time in Los Angeles and Pomona and had been in Redlands on only two occasions within the last six months. (T-138). When asked the question, "What in your opinion is the market value of this property?" he answered, "Well, I offered to take the property back." (T-15-136). Dr. Wumkes was further asked, "Would you be willing to take this property and cancel the indebtedness that you hold against it?" To which an objection was made and sustained. However, from his former answer, it is not difficult to conclude what his answer would have been had he been allowed to answer.

K. C. O'Bryan, called on behalf of the Creditor, testified that he was with the Southern Citrus Association, a packing house located in Redlands, and had been connected with said packing house for seven years. That he individually and as a partner is owner of seven parcels of citrus property, has known the property here in question

since 1936, at which time he was handling the fruit on this property. He defined market value as, "I think it might be a price that the grove could be sold for and a bidder could be found within a reasonable time." (T-16). He does not testify that he ever acted as appraiser or had any experience in appraisal work and he gives as his opinion the value of the property to be \$12,500.00.

During the testimony of K. C. O'Bryan (T-120) he was asked if he was prepared to make a cash offer for the purchase of the property, which was objected to, and Wumkes' counsel thereupon stated that he wished to offer proof of a cash offer in the amount of \$10,000.00 for this property and to tender therewith cash in the amount of \$50.00 and a certified check in the amount of \$950.00, being 10% of the amount of the offer, to which an objection was made, and the Commissioner sustained the objection. (T-120).

The Commissioner referred to this matter in the proceeding (T-17) and set forth the law as he understood it in his decision stating Paragraph 3 of Subsection (s) of Section 75 of the Bankruptcy Act, containing the proviso as follows:

"That upon request of any secured or unsecured creditor, or upon request of the debtor, the Court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the Court shall, by an

order, turn over full possession and title of said property, free and clear of encumbrances to the debtor.”

The second proviso provides:

“That upon the request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction.

The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with five per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act.” (T-18).

The Commissioner further went on to say:

“In view of the foregoing, this commissioner is constrained to the opinion, that the offer of purchase made by witness K. C. O’Bryan, was inadmissible.

No authority in the Act is given the court to sell the property of debtor except at public auction and that, only after debtor has been given the opportunity to comply with the first proviso of paragraph 3, supra.

Wright vs. Central Life Insurance Co., C. C. H. 52, 826, decided by the Supreme Court of the United States on December 9th, 1940.

The court has also given its views on introduction of evidence on offer to purchase, in Sharp vs. United States, 191 U. S. 341, 48 Law Ed. 211.

The testimony in the case at bar discloses a very wide difference of opinion as to the value of the property in question.

On the one hand we have witnesses on behalf of debtors, who have had years of experience in appraising real property, the nature of property involved here, including State

Inheritance Tax Appraiser, of the county in which said property is situated, these witnesses arrive at their conclusions of value after viewing the property, testing the soil, preparing plat showing position of and condition of trees, taking photographs of trees and taking into consideration all the elements which enter into the determination of value.

On the other hand we have witnesses on behalf of creditor, which with one exception, have had no experience in appraisals, nor have they shown any knowledge of elements going to make up value, the exception is Mr. King, who states, that his appraising does not involve citrus groves unless there might be a home on a citrus grove on which his company lends moneys.

After duly considering all the evidence adduced at the hearing, the reading of the transcript, considering the qualifications of witnesses produced, and being fully advised in the premises, I have reached the conclusion that the value of debtors' property involved in this hearing, on which Peter J. Wumkes, creditor, has encumbrance, is of the value of \$5,575.00.

When the matter was presented to the District Court there were two affidavits offered by Wumkes (T-36; T-38). The affidavit of L. A. Turner stated that the reasonable market value of the property was \$12,500.00 and that said affiant would be willing, upon the expectation of reselling said property immediately at a considerable profit, to offer at this time the sum of \$9,000.00 cash for the immediate purchase of said property and that he, therefore, made such an offer. To both of these affidavits objection was made and the District Court in its decision overruled the objection and ordered the affidavits filed and

considered and thereafter vacated the order made by the Commissioner-Referee determining value, stating that the evidence of the cash offer of \$10,000.00 should have been considered and that the ruling of the Commissioner-Referee rejecting such an offer, was erroneous.

Thus we have presented to your Honor the question of the admissibility of offers to purchase in a hearing of this particular nature.

It is our thought that the remarks of the Commissioner, as set forth in his decision, were very pertinent on the subject and particularly that of the case of *Sharp v. United States*, 191 U. S. 341. The court there said:

“Upon principle, we think the trial court was right in rejecting the evidence. It is, at most, a species of indirect evidence of the opinion of the person making such offer as to the value of the land. He may have so slight a knowledge on the subject as to render his opinion of no value, and inadmissible for that reason. He may have wanted the land for some particular purpose disconnected from its value. Pure speculation may have induced it, a willingness to take chances that some new use of the land might, in the end prove profitable. There is no opportunity to cross-examine the person making the offer, to show these various facts. Again, it is of a nature entirely too uncertain, shadowy, and speculative to form any solid foundation for determining the value of the land which is sought to be taken in condemnation proceedings. If the offer were admissible, not only is it almost impossible to prove (if it exists) the lack of good faith in the person making the offer, but the circumstances of the parties at the time the offer was made as bearing upon the value of such offer may be very difficult, if not almost impossible to show. To be of

the slightest value as evidence in any court, an offer must, of course, be an honest offer, made by an individual capable of forming a fair and intelligent judgment, really desirous of purchasing, entirely able to do so, and to give the amount of money mentioned in the offer, for otherwise the offer would be but a vain thing. Whether the owner himself, while declining the offer, really believed in the good faith of the party making it, and in his ability and desire to pay the amount offered, if such offer should be accepted, or whether the offer was regarded as a mere idle remark, not intended for acceptance, would also be material upon the question of the bona fides of the refusal. . . . In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication, and even dangerous in their character as evidence upon this subject. . . . There is no chance to cross-examine as to the circumstances of the party making the offer in regard to good faith, etc.”

If this type of evidence is to be admitted, it would appear that a hearing to determine value would disintegrate into merely an auction sale and clearly the law did not anticipate such a procedure, for it gave to the debtor the sole right to buy the property. If such evidence were admitted any one could come in and make any kind of an offer that they desired without any fear that the offer would be accepted by the court and that they would suffer financial loss by reason of the making of said offer.

In the affidavit admitted by the District Court over objection, Mr. Turner clearly states that he is willing, because he expects to resell the property immediately at a considerable profit, to offer \$9,000.00 cash for the immediate purchase of the property. Mr. Turner could not buy the property expecting immediate delivery, nor could the

Commissioner guarantee or assure him that he could immediately sell the property at a profit, without any responsibility being placed upon the bidder and no possibility of him being able to buy the property. The District Court asserts that such an offer should be admitted and considered by the court, and even though the Commissioner had heard the testimony and determined in his mind that the offer made by K. C. O'Bryan was inadmissible and that the element of good faith in said offer was very questionable, yet the District Court stamps this offer as a substantial and firm good faith commitment. Counsel, therefore, respectfully contends, first, that the Honorable District Court erred in vacating, setting aside and annulling the Order of the Conciliation Commissioner determining value of debtors' real property, dated June 21, 1944, and Secondly, that the District Court admitted and considered improper and illegal evidence in the making of that decision, to-wit, the affidavits and offers to purchase of Donald D. Wyllie and L. A. Turner, and others.

Respectfully submitted,

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